

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8610 OF 2006**

Shri Narayan Tukaram Patil .. Petitioner
Versus
Shri Jairam Ganpat Patil and anr.. Respondents

Ms.Shreya Deodhar i/b.Shreekant Gavand for the
Petitioner

***CORAM : S.R. SATHE, J.
DATED : 31/07/2007***

P.C. :-

1. Heard learned Advocate for the Petitioner.
2. As the Application filed by the Plaintiff for the appointment of inspector of land record as Commissioner to measure the suit land was rejected by the Trial Court the original Plaintiff has filed the present Petition.
3. From the perusal of the record, it is very clear that Plaintiff filed a suit for possession alleging that defendants have made an encroachment to the extent of 8 gunthas in his land. According to Plaintiff, he got the land measured privately and in that measurement encroachment was disclosed and hence, he filed the present suit. However, in order to verify whether there is such encroachment or not he submitted that the land be measured through DILR. Hence,

Plaintiff prayed that the DILR be appointed as Court Commissioner.

4. The defendant opposed the said application by contending that when it is the case of Plaintiff that the defendant has made an encroachment the burden lies on him to adduce sufficient evidence for the same. He can not use the machinery of the Court for collecting evidence. Besides this, he also contended that similar suit was filed by the Plaintiff bearing No.61 of 1995 in which court commissioner was appointed and it was proved that defendant has not made any encroachment and hence, the said suit was dismissed. The defendant, therefore, submitted that the application be dismissed.

5. The trial Court held that Commissioner can not be appointed for collecting evidence and therefore rejected the application.

6. Plaintiff filed the present petition to challenge the above order.

7. In this Petition, the learned Advocate for the Petitioner submitted that as per the provisions of order 26 of CPC, the Court is empowered to appoint the

Commissioner and if Commissioner is appointed it will be helpful to decide the suit correctly. However, it must be noted that when Plaintiff has filed the present suit for the possession of the encroached land it is boundant duty of the Plaintiff to produce the necessary map showing the alleged encroachment and prove the same. According to Plaintiff, he got the land measured privately and got the boundaries fixed and as encroachment was disclosed he filed the present suit. When such is the position, there is no need at this stage to appoint fresh commissioner. It is well settled that the object of Order-26, Rule-9 of CPC is not to assist a party to collect evidence where it can get the evidence itself. So, in the instant case, when Plaintiff was of the view that defendants have made an encroachment, the Plaintiff ought to have got the land measured through proper surveyor. If Plaintiff has not done so he has to suffer for the same. Appointing Commissioner at this stage would certainly amount to allow the Plaintiff to gather or collect evidence in a suit. If, at the time of recording of evidence, the Court finds that it is necessary to get the land measured or to have inspection of the same then the Court may appoint the Commissioner. But Plaintiff is certainly not entitled to get the Commissioner

appointed at this stage of the suit. The learned Trial Judge has rightly rejected the Plaintiff's application. There is no error of law in the said order.

8. Hence, the Petition is rejected.

(S.R. SATHE, J.)